SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 651

FLORIDA POWER CORPORATION, *Petitioner,*

v.

GAINESVILLE UTILITIES DEPARTMENT, CITY OF GAINESVILLE, FLORIDA, *Respondents.*

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. pp. 1a-14a) is reported at 425 F. 2d 1196. The main opinion and opinion on rehearing of the Federal Power Commission (Pet. App. 15a-40a, 40a-46a) are reported at 40 F.P.C. 1227 and 41 F.P.C. 4, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 1, 1970 (Pet. App. 14a) and was modified on June 17, 1970, in a manner not here material.[1] The conditional cross-petition for a writ of certiorari was filed as of August 28, 1970. Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act (16 U.S.C. 825l(b)).[2]

QUESTION PRESENTED

Whether the Court below properly affirmed the refusal of the Federal Power Commission to prescribe, as part of its order directing Florida Power to interconnect with Gainesville under Section 202(b) of the Fed-

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[1] The modification deleted a provision assessing one-third of the costs against the Commission (Pet. App. 14a).

[2] Since the Petition was not filed within ninety days from the date of judgment of the Fifth Circuit as prescribed in 28 U.S.C. 2101(c), it is out of time and should not be entertained by the Court. Florida Power (Petition, p. 2) claims that its filing was timely on the basis of an alleged exception pertaining to conditional cross-petitions, under which, according to Florida Power, such petitions need not be filed within the 90-day statutory period. However, there is nothing in this Court's opinions cited by Florida Power indicating the existence of such an exception or that the question was raised or passed upon by the Court. Nor is it clear from summary of the pertinent facts in these cases, set out in pp. 311-312 of Stern and Gressman *Supreme Court Practice* that the issue was even lurking in those cases. For example, Stern and Gressman's summary of the facts of *Brotherhood of Ry. and S.S. Clerks* v. *Florida East Coast Ry. Co.*, 382 U.S. 1008 (1966), 384 U.S. 238 (1966), suggests that the problem there was the very different one of whether an extension of time for filing a petition for certiorari granted at the request of one party operates to extend as well the time for filing by other parties in the proceeding. Indeed, Stern and Gressman take pains to point out (*Id.* at p. 311) that:

> "Normally, a cross-petitioner who seeks to review only if the original petition is granted is subject to the same time requirements as the petitioner and must file his cross-petition, within the same required time (usually 90 days) * * *."

eral Power Act, exclusive territorial arrangements for the two utilities.

STATUTE INVOLVED

The pertinent provisions of Section 202 of the Federal Power Act, 49 Stat. 847, as amended, 16 U.S.C. 824a, are reproduced at pp. 2-3 of the Petition.

STATEMENT

Most of the relevant facts are set out in the Petition in No. 464, this Term (at pp. 2-10) which is hereby incorporated by reference herein. The additional facts germane to the question sought to be raised in the instant Petition may be summarized as follows:

Gainesville has been in the electric power business since 1912, serving both within and outside the City. Beginning in 1927, Florida Power built lines into areas in Greater Gainesville which were, or could be, served by Gainesville (R. 1482). For example, over Gainesville's objections, Florida Power extended its lines across the City limits to serve an ice plant a few blocks from Gainesville's generating plant, a load it continues to serve today (R. 1481).

In addition, in 1930, Florida Power, by offering a lower rate, succeeded in obtaining the business of the University of Florida which Gainesville had been serving for many years. In 1935 the City regained the University load and held it until 1948, when Florida Power again obtained the business. Subsequently, in 1966 when competition again developed for the University load, Florida Power, by offering an $80,000 rate reduction, was the successful bidder for a 10-year contract, thereby assuring its presence within the City limits until 1976. Its total investment within the City limits to serve the University approximates some $500,000 (Pet. App. 29a, R. 474, 1481).

Gainesville's boundaries were expanded by annexation in 1962, thereby bringing within the City limits areas then being served at retail by Florida Power and Clay Electric Cooperative, an REA cooperative selling power in some 12 counties (R. 1481-2). Gainesville purchased the Clay facilities located within the expanded City limits, and customers previously served by Clay from those facilities are now served by Gainesville. However, Gainesville has been unable to negotiate a similar agreement with Florida Power; as a result, Florida Power continues to serve within the City limits some 22 commercial and residential customers, as well as the University and the ice plant, and there is duplication of distribution lines within the City (R. 476, 1482).

In recent years there also has been competition between Gainesville and Florida Power for new customers in the suburbs. In connection with its sale to Clay Electric, Florida Power rebuilt 2.76 miles of an abandoned 69 kv line, at a total cost of $36,000 to connect to a future Clay substation which is being built within a few hundred feet of where Gainesville has facilities capable of serving the loads in that area (R. 596, 773-5, 925-6). In addition, in competing for new household and business customers, Florida Power has been providing subsidies (loans and grants) to Westward Utilities, a local business which had been providing water and sewer service (R. 522-25, 527, 547). These include $430,000 in 20-year loans, interest-free for the first three years, and at least $50,000 in outright grants which were treated in its books as an expense (R. 816).

Gainesville has extended its lines into the suburban areas claimed by Clay and Florida Power, generally in response to requests for service, and to reach new busi-

nesses, schools, and new subdivisions (R. 1478-9, 1548, 1552-4). Prior to the hearings, Gainesville had constructed some 16.2 miles of such duplicating lines at a cost of $165,000, resulting in annual fixed costs and operating expenses of $16,550 (Pet. App. 29a). The competition has been primarily for *new* business. Florida Power has lost only two of its existing household customers as a result of the competition by Gainesville (R. 482-3, 624-5, 694). Florida Power is also concerned to protect its wholesale-for-resale business in Alachua County from competition by Gainesville. Florida Power serves the municipal utilities of Alachua and Newberry at wholesale, and Florida Power wants the Commission to prevent Gainesville's competing for this business.[3]

Notwithstanding his finding that the proposed interconnection was desirable and in the public interest, the Presiding Examiner recommended in his Initial Decision that the interconnection be ordered only upon the condition that the parties first reach an agreement to eliminate and avoid all duplication of facilities (Pet. App. pp. 70a-71a). The Commission, however, declined to condition its order directing interconnection on the requirement that Gainesville forego competing with Florida Power, stating in part (Pet. App. pp. 31a-32a):

> "The Commission is of the view that the competition between Gainesville and Florida Power, al-

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[3] As stated in oral argument before the Commission by Florida Power's Counsel (Tr. 1713): "They have announced that they intend to go up and take some of our wholesale customers—three cities, High Springs, Alachua and Newberry. That is next, I guess, and if they build this line over and connect with our 240 kv. line, they will be three quarters of the way to Newberry and they run a tap off that and go up to Newberry, and start selling power up there."

though understandably a matter of some annoyance to Florida Power, is not currently of major importance. The record before us does not show that this competition, either at the present time or in the near foreseeable future, will impose any undue burden upon Florida Power, nor will it impair the stability or prosperity of Florida Power's $500,000,000 system."

* * *

"The arguments concerning competitive activities of Florida Power and Gainesville in their retail operations * * * bring into focus public policy considerations of the State of Florida—single or multiple power sources operating within specific retail service areas. Since we cannot resolve the question of whether a given area of Florida shall be served by one, two, or three utilities, we see no reason why the result of retail operations of competing systems should control our judgment on whether bulk power facilities should be interconnected and operated coordinately. The regulatory jurisdiction conferred upon this Commission pursuant to Part II of the Federal Power Act does not extend to the regulation of retail sales, charges, and services."

On appeal, the Court of Appeals dealt with Florida Power's arguments in this regard by way of footnote (Pet. App. p. 1a, fn. 1). Affirming this aspect of the Commission's order, the Court stated (*ibid.*):

"We believe that the question of duplication of facilities is not directly related to this case and hold that the Commission was proper in refusing to condition the ordered interconnection of facilities on the elimination of this duplication."

ARGUMENT

The affirmance by the Fifth Circuit of the Commission's refusal to condition the interconnection upon the elimination of competition and duplication of facili-

ties is clearly correct. It is based upon long and well established principles and does not involve any novel questions of general importance. In addition, since the issue is separate from and unrelated to that presented in No. 464, there is no occasion to grant this conditional cross-petition together with the petition in No. 464.

1. Although, as Florida Power asserts (Pet. pp. 8-9), Congress may have intended in enacting the Federal Power Act to eliminate *wasteful* competition, Florida Power is in error in inferring therefrom a Congressional intent to eliminate *all* competition among regulated companies. To the contrary, the courts and the federal administrative agencies, including the Federal Power Commission, have consistently recognized that although competition may result in some duplication of facilities, it nevertheless is a valuable supplementary tool in the regulation of the so-called "natural monopolies."[4]

As a result, it is now established federal law (1) that a regulated company does not have a vested interest

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[4] While Florida Power (Pet. p. 14) seeks to imply otherwise, the Florida Commission concededly does not have authority to limit the areas served by a municipally-owned utility such as Gainesville and thereby preclude it from competing with other utilities (R. 697; see also Pet. p. 17).

Moreover, in *City Gas Co.* v. *Peoples Gas System Inc.*, 182 So. 2d 429 (Fla. 1965) (Pet. p. 17), in which the Florida Supreme Court upheld the power of the Florida Public Utilities Commission to approve an agreement among investor-owned distributing companies with regard to exclusive service areas, that Court expressly recognized that its ruling reflected the minority view and that "a majority of jurisdictions considering this question have held similar agreements violative of antitrust laws * * *. However, we are of the opinion that the cases so holding have emphasized unduly the universal desirability of competition and have not shown sufficient awareness of the implications of the modern development of the regulated monopoly" (182 So. 2d at 43).

in the markets served by it; (2) that competition among the so-called "natural monopolies" can be beneficial to the consuming public and hence be in the public interest; and (3) that the existence of competition is an important plus factor in determining the public interest under licensing or certificate provisions of the various federal regulatory statutes. See, e.g., *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 86-8 (1944); *FCC* v. *RCA Communications Inc.,* 346 U.S. 86, 94 (1953); cf. *California* v. *FPC,* 369 U.S. 482 (1962); *United States* v. *El Paso Natural Gas Co.,* 376 U.S. 651 (1964); *SEC* v. *New England Electric System,* 384 U.S. 176, 182-3 (1966). As summarized in the *RCA* case, *supra,* at 93-4:

> "* * * the fact that there is substantial regulation does not preclude the regulatory agency from drawing on competition for complementary or auxiliary support. Satisfactory accommodation of the peculiarities of individual industries to the demands of the public interest necessarily requires in each case a blend of private forces and public intervention."

The propriety of permitting and even promoting at least a measure of competition among regulated companies is reinforced by (1) the strong national policy favoring competition embodied in the antitrust laws and in particular by the well-settled principle under those laws that territorial agreements are *per se* violations (see, e.g., *Northern Pacific Ry.* v. *United States,* 356 U.S. 1, 5 (1958); *United States* v. *Sealy, Inc.,* 388 U.S. 350 (1967); see also *Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593 (1951); and (2) the established principle that while, for example, the Federal Power Commission does not have the responsibility for enforcing the antitrust laws, it must nevertheless con-

sider the national policy expressed by Congress in these laws as bearing upon the question of public interest. See, e.g., *California* v. *FPC., supra* at 485 (1962); City *of Pittsburgh* v. *FPC,* 237 F. 2d 741, 747 (D.C. Cir. 1956); *Northern Natural Gas Co.* v. *FPC,* 399 F. 2d 953 (D.C. Cir. 1968).[5]

2. Florida Power's further argument (Pet. pp. 14-16), that the Commission's failure to require a division of service areas violates the principle that a utility cannot be required to provide a competitor with the means of engaging in such competition, similarly is without merit. Since the controlling objective of the Federal Power Act, generally, and of Section 202(b) thereof, specifically, is the furtherance of the interests of the ultimate consumers, no lengthy discussion or analysis is needed to demonstrate the basic inconsistency between that objective and the goal of protecting private interest which underlies the argument of Florida Power. In situations where competition results in substantial net benefits to the consuming public, it would vitiate the Act's purpose to withhold these benefits because one of the competitors acquired the means for engaging in such competition from the other. See *Otter Tail Power Co.* v. *FPC,* F. 2d , 8th Cir. No. 19628 (decided August 4, 1970) slip opinion pp. 7-8; *Transcontinental Gas Pipe Line Corp.,* 35 F.P.C. 917 (1966); *Columbia Gulf Transmission Co.,* 37 F.P.C.

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[5] *Pennsylvania Water & Power Co.* v. *FPC,* 343 U.S. 414 (1952) does not stand for the proposition asserted by Florida Power (Pet. p. 16). While the Commission there, with this Court's approval, directed the two utilities to interconnect and coordinate their generation of electric energy under Section 202(b), the Commission did not undertake also to require a division of territory. *A fortiori,* this Court's decision did not uphold any requirement of such division of territory, as urged by Florida Power.

118 (1967); *City of Hamilton, Ohio,* 37 F.P.C. 209 (1967) affirmed, *sub nom. Cincinnati Gas & Electric Co.* v. *FPC,* 389 F. 2d 272 (6th Cir. 1968) *cert. denied,* 393 U.S. 826 (1968); *Algonquin Gas Transmission Co.,* 37 F.P.C. 1128 (1967); *Alabama-Tennessee Natural Gas Co.,* 38 F.P.C. 1069 (1967), affirmed 417 F. 2d 511 (5th Cir. 1969), *cert. denied,* 397 U.S. 917 (1970).

Not only has the Commission rejected, explicitly or implicitly, Florida Power's alleged principle in the cases cited *supra,* but this Court has made it clear that a regulated company may not decline to serve, or interconnect with, a competitor because it would facilitate competition by the competitor. *American Trucking Ass'n. Inc.* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 387 U.S. 397, 407-409 (1967) and cases there cited; *United States* v. *Pennsylvania R.R.,* 323 U.S. 612 (1945). The *American Trucking* case involved the question, among others, whether a railroad may be required to make its so-called "piggy-back" service available to motor and water carriers which competed with it. This Court there reversed the District Court, which had sustained the railroads' refusal to provide the service to those competitors, saying in no uncertain terms (387 U.S. at 407):

> "* * * The fact that the person tendering traffic is a competitor does not permit the railroad to discriminate against him or in his favor * * *."

Thus, this Court there focused upon whether the service requested by the competitor would be in accord with the statutory policy and further the public interest. Concluding that the requested service would so advance the public interest, the Court had no doubt of the railroads' duty to provide the service, even though it might

help the competitive position of the motor and water carriers.

3. The foregoing is particularly controlling here inasmuch as the competition by Gainesville has not had any substantial adverse economic impact upon Florida Power, contrary to the assertion of Florida Power (Pet. p. 14). As noted by the Commission, while such competition by Gainesville "is understandably a matter of some annoyance to Florida Power, [it] is not currently of major importance" (Pet. App. 31a).

Thus, the record shows that the total of Gainesville's alleged duplicative facilities prior to the hearings aggregated only some 16.2 miles of line representing an investment of approximately $165,000 and annual fixed costs and operating expenses of $16,550 (Pet. App. p. 29a), with 3.72 miles thereof being alleged duplicative facilities of Florida Power and the remainder allegedly duplicative of Clay Electric (R. 476-8, 766-7). These facilities, whether viewed in their totality or limited to the portion allegedly duplicative of Florida Power alone, are very small as compared, for example, to Florida Power's $500,000 investment in direct facilities, exclusive of the cost of generator and transmission facilities, to provide retail service to the University of Florida, which is located 80% within Gainesville's city limits and is completely surrounded by areas served by Gainesville (R. 592-3).

Moreover, Florida Power admittedly lost only two of its existing household customers as a result of the competition by Gainesville (R. 482-3, 624-5, 694). In the words of Florida Power's own witness, the sole effect of the competition is that Florida Power just has not "been quite as successful as [it] would have liked to have been" in competing for new business in the metro-

politan area (R. 694-5). Indeed, during the administrative hearings, Florida Power's Counsel stressed that its witness "at no place testified that we are losing money or anything" as a result of the competition (R. 572).

Plainly, therefore, Gainesville's competition has not caused a decrease in Florida Power's revenues from the Gainesville area. And since the revenues attributable to that portion of Florida Power's business are a very small part of the Company's total revenues from its widespread retail and wholesale business in 32 Florida counties, it is apparent that, viewed objectively and unemotionally, the competition by Gainesville has no real impact upon Florida Power.

4. Finally, Florida Power is in error in urging that the Commission has the requisite jurisdiction to prescribe exclusive retail distribution territories. Section 201(b) of the Act defines the Commission's jurisdiction over electric utilities as follows:

> "The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy.... The Commission ... shall not have jurisdiction ... over facilities used in local distribution...."[6]

That the above provision was intended to limit the Commission's jurisdiction so as to exclude local distribution therefrom is clear from the consistent holdings to that effect by this Court. Thus, in *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.,*

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[6] The exception "except as specifically provided in this Part and the Part next following" has no relevance here since Section 202(b) does not contain the requisite specific provision.

314 U.S. 498 (1942), the first case coming before this Court involving this jurisdictional provision, the Court ruled that Congress had adopted the jurisdictional dichotomy revealed by the *Attleboro* and *Pennsylvania Gas* cases[7] (314 U.S. at 506-7), i.e., that Congress had vested the Federal Commission with jurisdiction over sales "at wholesale to local distributing companies" which the States had no authority to regulate, but had denied the Commission jurisdiction over sales at "local retail rates to ultimate consumers" which the States could regulate (*Id.* at 504). See also *FPC* v. *Southern California Edison Co.*, 376 U.S. 205 (1964); *United States* v. *Public Utility Commission of California*, 345 U.S. 295, 307, 311 (1953); *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507 (1947).

In view of this dichotomy, it is apparent that the Commission has no authority to prescribe exclusive retail distribution areas as urged by Florida Power. Such a matter is primarily one of local concern, as is emphasized by the fact that here as in the *Pennsylvania Gas* case (252 U.S. at 30), the local distribution facilities claimed by Florida Power to be duplicative are used for sales "to local consumers who are reached by the use of the streets of the city in which the [lines] are [strung] and through which the [energy] is conducted to . . . residences. . . ." Plainly, as in *Pennsylvania Gas*, these activities are "local in nature" and "not of that character which requires general and uniform regulation . . ." under the Federal Power Act.

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[7] *Public Utilities Commission* v. *Attleboro Steam and Electric Co.*, 273 U.S. 83 (1927); *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U.S. 23 (1923).

As the Commission stressed in its opinion herein (Pet. App. 32a):

> "The arguments concerning competitive activities of Florida Power and Gainesville in their retail operations * * * bring into focus public policy considerations of the State of Florida—single or multiple power sources operating within specific retail service areas. Since we cannot resolve the question of whether a given area of Florida shall be served by one, two, or three utilities, we see no reason why the result of retail operations of competing systems should control our judgment on whether bulk power facilities should be interconnected and operated coordinately."

Indeed, any Commission undertaking to prescribe an exclusive retail distribution area for Gainesville, as sought by Florida Power, would be particularly anomalous in light of the policy of the Florida legislature against restricting the areas served by municipally-owned utilities. See *supra,* p. 7. Durig each of the last two sessions of the Florida Legislature, bills to provide for exclusive service territories have been introduced, but not passed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this conditional cross-petition should be denied.

Respectfully submitted,

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